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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1760

DILLON MATERIALS HANDLING, INC.,

Petitioner,

v.

ALBION INDUSTRIES, A Division of KING-SEELEY THERMOS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Supreme Court of The United States:

Respondent, Albion Industries, a Division of King-Seeley Thermos Company (hereinafter sometimes called "Albion"), presents this its Respondent's Brief in Opposition to the Petition for Writ of Certiorari of Petitioner, Dillon Materials Handling, Inc. (hereinafter sometimes called "Dillon").

OPINIONS, STATUTES AND JURISDICTION

The opinions of the courts below, the statutes involved in this case, and the jurisdiction of the Court are contained in Dillon's Petition.[1]

[1] Albion would point out an error in Dillon's reproduction of the court of appeals opinion. On page 60 of Dillon's Petition, the first full paragraph states that "[o]n September 19, 1974, Albion filed suit against Dillon . . . ." That sentence should read "[o]n September 19, 1974, Dillon filed suit against Albion . . . ." 567 F.2d at 1301.

STATEMENT OF THE NATURE OF THE CASE

Dillon, a terminated distributor, brought an action under section 1 of the Sherman Act and section 3 of the Clayton Act against Albion. Prior to trial, Albion filed and urged the district court to grant its motion for summary judgment on all counts, particularly the alleged violations of section 3 of the Clayton Act. Tr. 170.[2] At the close of Dillon's evidence and at the close of all the evidence, Albion filed motions for directed verdict on all alleged violations. R. 1160, 1927. These motions were carried by the district court, which allowed the case to go to the jury on special interrogatories. Tr. 314.

Subsequent to the jury verdict, Albion filed its motion for judgment n.o.v., which the district court granted. Tr. 327, 336. The court of appeals affirmed the district court. 567 F.2d 1299 (1978). Albion respectfully submits that the petition for writ of certiorari should not be granted in this case for the reasons that: (1) Dillon failed to prove a violation of section 3 of the Clayton Act as correctly determined by both lower courts; (2) Dillon seeks review of the sufficiency of evidence questions properly considered and rejected by both lower courts; (3) no conflict exists with Supreme Court precedent nor with any court of appeals; (4) Dillon failed to plead or prove any "sale or contract for sale" on the condition proscribed by section 3 of the Clayton Act; and (5) this case is not of sufficient legal breadth or scope to warrant this Court's granting a writ of certiorari.

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[2] Due to a duplication of page numbers between Volume I of the Record and Volume II, *et seq.*, those items which related to pages of the pleadings, motions and orders of the trial court which are contained in Volume I will be referred to as Tr. ..... and reference to testimony will be referred to merely as R. ..... which begins in Volume II.

STATEMENT OF FACTS

Albion cannot adopt the statement of facts contained in Dillon's Petition. Albion adopts the fact statements contained in the opinion of the Court of Appeals for the Fifth Circuit as the correct statement of facts together with the following additional facts.

It is undisputed that Albion never threatened Dillon with cancellation of its distributorship for *any* reason. Indeed Dillon's first suspicion that it was going to be terminated occurred when Albion's sales manager came to Dallas on February 24, 1974, to tell Dillon's president of the termination. R. 284. Albion knew that Dillon sold competitive casters from the time Dillon was appointed an Albion distributor. R. 123. The letter appointing Dillon as an Albion distributor in November 1971 did not require Dillon to refrain from dealing in casters competitive to Albion casters. Def. Ex. 2. Dillon's president testified that Albion never asked or required Dillon to stop distributing competitive casters. R. 124, 301. At no time did Albion require Dillon's promise to stop selling Colson or any other brand of caster in order to get or keep the Albion distributorship. R. 123.

During 1973 Albion experienced increasing difficulty getting Dillon to pay Albion's invoices within its credit terms of 1% 10 days - Net 30. R. 1337 and Def. Ex. 5. Albion personnel were making frequent telephone calls to Dillon concerning the status of its account. R. 1343-1378. In addition, Albion put Dillon on "credit hold" and refused to make shipments on approximately ten different occasions while Dillon was a distributor. R. 1379. Even Dillon's president could recall being placed on credit hold. R. 175.

Dillon's lack of efforts to promote Albion casters was typified by the fact that it was not until October 1974, some six months after being cancelled by Albion, that Dillon first listed the name Albion in any of its Dallas

Yellow Page advertising. R. 272 and Def. Ex. 64C. The listing of Albion in its Yellow Page ad was done, according to Dillon's president, to show the public that Dillon could still supply Albion casters. R. 274.

Albion's president, Mr. Dobbins, testified that Albion had had no exclusive dealing requirement in order for a distributor to get, or keep, the Albion product line. R. 572, 645. Another Albion distributor testified that no one at Albion ever told him, as an Albion distributor, that he was not free to deal in and sell products which were competitive with the Albion line. R. 955. This same distributor testified that certain of the products which it carried both in Houston and Dallas were competitive with Albion products. R. 955.

There is no suggestion from testimony in the record that Albion had made even one sale to Dillon upon the condition of exclusivity of product.

Dillon did not present any evidence that any sales were made by Albion to the successor Albion distributor who replaced Dillon, upon the condition that such distributor not handle competitive products. To the contrary, the distributor who succeeded Dillon sells competitive products in both Dallas and Houston. R. 857, 859, 946 and 955.

The statement of facts in Dillon's Petition fails to set forth any evidence of even a tendency to substantially lessen competition or create a monopoly in any line of commerce. The fact that all evidence in the trial court on this point was unfavorable to Dillon's position explains this omission. Dillon offered no testimony as to any fact indicating that Albion's alleged exclusive distributorship policy in any way adversely affected Albion's competitors' ability to sell casters competitive with Albion. Therefore, this record is entirely void of any evidence of a tendency to substantially lessen com-

petition or create a monopoly in any line of commerce as required by section 3 of the Clayton Act.

The only testimony concerning effects upon competition was as follows: (1) Dillon's president testified that the effect of cancellation *on Dillon* has been that Dillon no longer has a complete line and cannot be as competitive with local competitors as before termination, R. 173; (2) Dillon's president testified that after termination there was "an awful lot" of competition in the caster business and even "more so than there has been in the past" for Dillon, R. 388; and (3) Dillon's successor to the Albion distributorship stated that there was a considerable amount of competition from other caster manufacturers and distributors after it acquired the Albion distributorship, R. 889. The record is totally void of testimony concerning any adverse effect on competition in the United States caster market by an alleged Albion policy of exclusivity of product or by Albion's termination of Dillon.

At pages 34-35 of Dillon's Petition, Dillon states that Albion sells at least 70% of all industrial casters sold in the caster industry. This is a misstatement not supported by the record. The speculative testimony of Dillon's president, Davis, (which was admitted over the strenuous objection of Albion's counsel because there was no predicate laid for the testimony and there was no factual basis given for this testimony) was that Albion sold 70% of certain limited sizes of casters which Davis testified were not available to Dillon on the same basis that Albion's casters were available. R. 211-223. Davis testified at length that the competitive casters available to Dillon in those certain sizes produced by Albion were not available to Dillon "on the same basis" as Albion's casters were available to it. Dillon's "on the same basis" argument presumably means that (a) Dillon was not an "exclusive stocking distributor" for Albion's competitors on these limited sizes of casters,

(b) Dillon did not get as large a discount from Albion's competitors on these limited sizes of casters, or (c) delivery times, terms or other factors were not as favorable from Dillon's standpoint as purchasing Albion's casters during the time it was an Albion distributor. Davis speculated that, as to these certain sizes of casters, Albion enjoyed 70% of the sales in the U.S. market, whatever that undefined market may be interpreted to be. R. 226. Davis further speculated that, as to the certain few items that were "just not offered by any other manufacturer", Albion enjoyed in excess of 70% of some unidentified market. R. 227. Davis speculated that in the Albion series 62, and larger series of casters, Albion enjoyed in excess of 70% or more of yet another undefined market. R. 228-229. There is no testimony in this record that supports an assumption that Dillon sells throughout the U.S. market, or that Dillon's customers can reasonably be expected to look throughout the U.S. market to satisfy their caster needs. There is no testimony as to the percentage of caster sales in the undefined market enjoyed by Albion and in which Dillon does make sales of casters.

RESPONSE TO QUESTIONS PRESENTED

1. THE RENDITION OF JUDGMENT N.O.V. BY THE DISTRICT COURT AND THE COURT OF APPEALS' AFFIRMANCE WAS PROPER.

A. Application of the *Boeing v. Shipman* test was proper in that no conflict exists with Supreme Court precedent nor with any court of appeals.

Dillon alleges that the appropriate standard for reviewing the sufficiency of the evidence to support a judgment n.o.v. in antitrust actions is that set forth in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Dillon further alleges that the *Boeing Co. v. Shipman* test[3] utilized by the court of

[3] The *Boeing* test is stated as follows, 411 F.2d at 374-75:
"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and *with all reasonable inferences* most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that *reasonable men* could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is *substantial evidence opposed to the motions*, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. *A mere scintilla of evidence is insufficient to present a question for the jury.* The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. *There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.*" (Emphasis added.)

appeals is inappropriate and in conflict with the Court's test in *Continental*. *Continental* requires that: (1) the evidence be viewed in the light most favorable to the party opposed to the motion; (2) the evidence be given the benefit of all inferences which it fairly supports, even though contrary inferences might reasonably be drawn; and (3) the jury be allowed to weigh the contradictory evidence and inferences and draw the ultimate conclusion as to the facts. 370 U.S. at 696-701. The requirements of *Boeing*[4] demand no less than the Supreme Court demands in *Continental*. The *Boeing* test, thus, is as appropriate in the case at bar as would be the Court's own test in *Continental*.

Dillon asserts that by citing a FELA case, *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29 (1944), twice within the *Continental* opinion it is "clear that the court [sic] considered the same standards applicable

[4] *See* note 3, *supra*.

to both FELA and antitrust cases".[5] Albion cannot agree. *Tennant* is cited once by the Court in a footnote as indirect support for the proposition that the court must examine the evidence in the light most favorable to the party opposed to the motion.[6] The Court then cites *Tennant* within the text to establish that the jury "'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'"[7] The Court in *Continental* never concludes that the standards used for reviewing the sufficiency of the evidence in an antitrust case and a FELA case are one and the same.

In 1977 the Court was again faced with a question concerning the propriety of a judgment n.o.v. in the antitrust context. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 479 (1977). The judgment n.o.v. was found proper with the Court citing the standard affirmed in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), and cited in *United States v. Generes*, 405 U.S. 93 (1972). That test was stated as follows:

> "A ... court ... has the duty to direct a verdict 'where the evidence is without dispute or is conflicting but of such a conclusive nature that if a verdict were returned for the plaintiff or defendant, as the case may be, the exercise of sound judicial discretion would require that it be set aside.'" *Martin K. Eby Constr. Co. v. Neely*, 344 F.2d 483, 484 (10th Cir. 1965), *aff'd.*, 386 U.S. 317 (1967).

[5] Dillon's Petition, p. 24. The absence of identical language is not controlling. *See Galloway v. United States*, 319 U.S. 372 (1943). *See also* note 12, *infra.*

[6] 370 U.S. at 696 n.6.

[7] *Id.* at 701.

Significant is the fact that the standard utilized by the Court in these cases was not the FELA standard announced in *Lavender v. Kurn*, 327 U.S. 645 (1946).[8]

The Court's latest examination of judgment n.o.v. and sufficiency of the evidence in *Brunswick* reflects that the Court is not utilizing the *Kurn* "complete absence of probative facts" test in the antitrust area. Dillon's assertion of conflict with Supreme Court precedent is equally unfounded. The *Boeing* test, although admittedly not verbatim, tracks the Court's language in *Continental*. The Court never stated expressly, or by implication, that the FELA standard for reviewing the sufficiency of the evidence is appropriate in antitrust cases.

Assuming, *arguendo*, that the FELA standard is the appropriate standard from which to review the sufficiency of the evidence in the instant case, the result reached by the lower courts would remain unchanged. The district court judgment provided:

> "The court has considered carefully the briefs and arguments of counsel and is of the opinion that

[8] The *Lavender v. Kurn* test is stated as follows, 327 U.S. at 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

> there is insufficient evidence to support the jury's implicit finding that the effect of any exclusive dealing agreement may have been to substantially lessen competition or tend to create a monopoly in a line of commerce and that judgment n.o.v. in favor of defendant and against plaintiff should be entered."[9]

This judgment was affirmed by the court of appeals. 567 F.2d 1299 (1978). Judgment n.o.v., thus, was granted due to Dillon's failure at trial to establish the requisite effect on competition.

Dillon asserts that the FELA test was "best enunciated" in *Lavender v. Kurn, supra.*[10] Accepting this "complete absence of probative facts" test as the appropriate one for purposes of argument, a judgment n.o.v. would still be required. As found by the court of appeals:

> Dillon produced *no* evidence, either directly or indirectly, that Albion's competitors were precluded or discouraged from entering the market because of any practice or policy of Albion. 567 F.2d at 1305 n.19. (Emphasis added.)

In view of the complete absence of facts at trial to establish a restraint on trade, *Lavender v. Kurn* would demand the entry of a judgment n.o.v., which would be the identical result reached by the lower courts.

This Court, however, should not expand the application of the FELA standard, as exemplified in *Lavender v. Kurn*, to non-FELA cases. The expanded application of the FELA standard would represent a return to the scintilla rule which was repudiated by the Supreme Court as early as 1871. *Improvement Co. v. Munson,*

[9] *See* Dillon's Petition, Appendix D.

[10] *See* note 8, *supra.*

81 U.S. 442 (1871). *See* 5A *Moore's Federal Practice* ¶ 50.02[1] (1977); *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 563-64 (1957) (Harlan, J., dissenting). Under the abandoned scintilla rule a court could not direct a verdict so long as there was *any evidence* in support of the proposition tendered. The *Kurn* "complete absence of probative facts" test is simply a restatement of the long-abandoned scintilla rule.

As Professor Moore aptly stated, the judicial authorities on the question of the appropriate standard to be used for directing a verdict are generally in accord although the language utilized remains diverse. 5A *Moore's Federal Practice* ¶ 50.02[2] (1977). The validity of this observation is supported by a review of the cases which clearly reveals that "the 'substantial evidence' or 'reasonable man' test formulated by *Boeing*"[11] is in accord with all other circuits. Albion respectfully submits that any inference that the circuits are in conflict is simply not supported by the authorities.[12] An examination of the authorities clearly demonstrates that the standards are substantively the same. Although some circuits phrase their standard in terms of "reasonable" and others prefer "substantial", it is a distinction without a difference. "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938). It is appropriate to recall this Court's admonition that the function of review is not ". . . greatly aided by substituting one general formula for another." *Galloway v. United States*, 319 U.S. 372, 395 (1943). Rather, this Court has emphatically stated that ". . . the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making

[11] Dillon's Petition, p. 21.

[12] First Circuit:

> It is proper to direct a verdict in a case where the evidence is such that, without weighing the credibility of

due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere

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the witnesses or otherwise considering the weight of the evidence, there is only one verdict reasonable men could reach .... If the evidence is of such quality and weight that reasonable men might reach different conclusions in the exercise of impartial judgment, a motion for directed verdict should be denied.

Harrington v. United States, 504 F.2d 1306, 1311 (1st Cir. 1974), *citing, inter alia, Trawick v. Manhattan Life Insurance Co.*, 484 F.2d 535 (5th Cir. 1973) (other citations omitted). [*Trawick* is one of *Boeing's* progeny.]

Second Circuit:

"If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969)."

Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978).

Third Circuit:

An articulate statement of the federal standard in diversity cases was made by the Fifth Circuit, following an exhaustive survey, in *Boeing Company v. Shipman* ... [quoting the *Boeing* court].

Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1212 n.7 (3rd Cir.), *cert. denied*, 400 U.S. 826 (1970).

Fourth Circuit:

A direction should be granted where there is "no substantial evidence to support" the verdict asked of the jury.

difference in labels used to describe this standard . . . cannot amount to a departure from 'the rules of the

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Business Develop. Corp. v. United States, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 947 (1970). *See Hawkins v. Sims*, 137 F.2d 66, 67 (4th Cir. 1943).

Fifth Circuit: *See* note 3, *supra*.

Sixth Circuit:

The court must construe the evidence most strongly in favor of the party against whom the motion is made, and, where there is substantial competent evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. . . . *Durham v. Warner Elevator Mfg. Co.*, 166 Ohio St. 31, 36, 139 N.E.2d 10, 14 (1956).

Domany v. Otis Elevator Co., 369 F.2d 604, 608 (6th Cir. 1966). *See Davis v. Marathon Oil Co.*, 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

Seventh Circuit:

In [reviewing the lower court's decision] we are not deciding whether the weight of the evidence does or does not support an antitrust violation. We are not weighing the evidence but only inquiring as to whether there is any substantial evidence which would support a verdict, for if there was then a motion for judgment notwithstanding the verdict insofar as the antitrust issue was concerned should have been overruled.

Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

Eighth Circuit:

There must be conflict in substantial evidence to create a jury question. Neither a directed verdict nor judgment n.o.v. should be granted unless the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion.

Hernon v. Revere Copper and Brass, Inc., 494 F.2d 705, 709 (8th Cir.), *cert. denied*, 419 U.S. 867 (1974).

common law which the Amendment requires to be followed.'" 319 U.S. at 395.

Ninth Circuit:

> When considering the propriety of the grant or denial of a motion for directed verdict, the correct standard is whether or not, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party.

Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). *See Quichocho v. Kelvinator Corp.*, 546 F.2d 812 (9th Cir. 1976).

Tenth Circuit:

> .... [T]he evidence must be viewed in the light most favorable to the party opposing the motion (together with inferences which may be fairly drawn therefrom), and the verdict not directed nor the motion granted unless the evidence points all one way, and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is directed. The motion must also be denied if the evidence and the inferences, so examined, are such that reasonable men may reach different conclusions. *Kippen v. Jewkes*, 258 F.2d 869 (10th Cir.)

McCracken v. Jones, 562 F.2d 22, 25 (10th Cir. 1977).

D.C. Circuit:

> It is the function of the judge to identify those conflicts [in evidence] which are serious and substantial and jury resolution of which is, accordingly, crucial to the issue of liability.

Law v. Virginia Stage Lines, Inc., 444 F.2d 990, 995 (D.C. Cir. 1971).

B. The *Boeing v. Shipman* test does not violate the seventh amendment.

The constitutional argument made by Dillon does not challenge generally the power of federal courts to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict. This Court has long recognized the constitutionality of the directed verdict and judgment n.o.v. *Galloway v. United States*, *supra*, and cases cited therein. *See also, Neely v. Martin K. Eby Construction Co.*, *supra*. Dillon asserts, however, that application of the *Boeing* test deprives it of its constitutional right to a jury trial guaranteed by the seventh amendment.

The judgment n.o.v. affirmed and upheld as constitutional by this Court in *Galloway* utilized an identical test to that propounded by the Fifth Circuit in *Boeing*. In *Galloway* the court of appeals stated:

> A Federal Court is not permitted to submit a case to a jury on probabilities or a mere scintilla of evidence, but *there must be some substantial evidence offered* by the plaintiff to justify submission of the case to the jury. 130 F.2d 467, 470 (9th Cir. 1942), *aff'd*, 319 U.S. 372 (1943).

This Court examined the propriety of the inclusion of the word "substantial" within a judgment n.o.v. standard in *Galloway* and found it both proper and constitutional. Petitioner's constitutional argument is without merit.

2. DILLON FAILED TO ESTABLISH THE EXISTENCE OF AN EXCLUSIVE DEALING AGREEMENT OR THE PROSCRIBED EFFECT ON COMPETITION AS REQUIRED BY SECTION 3 OF THE CLAYTON ACT.

All of the cases relied upon by Dillon in its Petition regarding section 3 of the Clayton Act are distinguish-

able from this case in that they involved tying, requirements contracts or a limited patent monopoly combined with stringent enforcement of exclusive dealing provisions in the contracts. None of those elements is present in this case.

The district court held that Dillon failed to show that the effect of any exclusive dealing agreement may have been to substantially lessen competition or tend to create a monopoly in a line of commerce. The court of appeals affirmed the district court's judgment and additionally found that Dillon had failed to prove the existence of an exclusive dealing requirement in its dealings with Albion. The holdings of the lower courts were correct and are confirmed by this record in which Dillon's president, sales manager, purchasing agent and salesmen testified to the effect that Dillon sold whatever casters were necessary to satisfy its customers' needs. The record does not disclose any requirement imposed upon Dillon by Albion that brings this case within the conditions proscribed by section 3 of the Clayton Act. Further, the record is void of any harassment or threatened termination by Albion of Dillon's franchise for Albion casters.

Dillon, both in the lower courts and in its Petition to this Court, has never shown that any Albion policy may have had the proscribed effect on competition dictated by section 3 of the Clayton Act. To the contrary, the testimony of Dillon's own employees, from its president down to its salesmen, was to the effect that Dillon was not required to sell only Albion casters to the exclusion of all competitive casters. Additionally, Dillon failed to produce any evidence that Albion's policy may have had the effect of foreclosing the caster market to manufacturers of casters competitive to Albion's casters. Without such a showing, Dillon would never be successful in proving any violation of section 3 of the Clayton Act.

Despite these failings, Dillon has asked this Court to grant a writ of certiorari to impose liability under section 3 of the Clayton Act. This Court has set forth in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the requirements for the necessary economic study which Dillon failed even to attempt to satisfy in this case. This Court has recently denied certiorari on facts similar to the present case in *Davis v. Marathon Oil Co.*, 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). *Davis* was an antitrust action under section 3 of the Clayton Act in which judgment n.o.v. was rendered for the defendant and affirmed by the Court of Appeals for the Sixth Circuit.

Dillon's Petition for Writ of Certiorari should be denied because the record in this case (a) fails to establish the existence of an exclusive dealing agreement, (b) fails to establish any adverse effect upon competition and (c) does show that the cancellation of Dillon and the appointment of the successor distributor had the effect of *increasing* competition in the area previously served by Dillon. If the Court were to grant a writ of certiorari in this case, and accept Dillon's position, it would become impossible for a manufacturer to terminate a distributor which sold competitive products. If Dillon's position were carried to its logical conclusion, the lucky dealer with both a Chevrolet and Ford dealership could never be terminated by either General Motors or Ford without expecting an antitrust claim that the termination was for retaliation because the dealer handled competitive products. This result would make no sense under the antitrust laws when the record here shows a pro-competitive effect at the distributor's level and *no* adverse effect at the manufacturer's level.

CONCLUSION

A proper analysis of the district court judgment and the well-reasoned court of appeals opinion requires that this Court deny certiorari in this case. The questions presented by Dillon's Petition for Writ of Certiorari are illusory and without merit. Therefore, such Petition should be denied by this Court.

Respectfully submitted,

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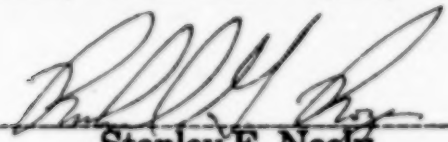
By 
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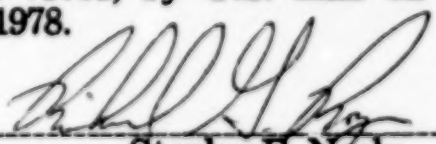
CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing document has been forwarded to opposing counsel, Mr. Paul Thorp, Matthews & Thorp, One Main Place, Dallas, Texas 75250 and Mr. Jack N. Price, Price & Williams, 306 East 11th Street, Suite L-7, Austin, Texas 78701, by U.S. mail on this the 7TH day of July, 1978.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